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No. 85-1733

In the Supreme Court of the United States

OCTOBER TERM, 1985

JOHN CHARLES McANINCH, et al.,
Petitioners,

vs.

TRADERS NATIONAL BANK OF KANSAS CITY
and JOHN H. KREAMER, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the Court of Appeals, applying Missouri law to the facts and evidence in the record, correctly hold that the District Court properly entered judgment in favor of respondents in petitioners' malicious prosecution cases?

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Respondents Traders National Bank of Kansas City, John H. Kreamer, William L. Turner, Wayne H. Hoecker, George Coughlin, Gage & Tucker, Thomas J. Guilfoil and General Bancshares Corporation respectfully submit this Brief in Opposition to the Petition for a Writ of Certiorari filed by petitioners John Charles McAninch, et al.[1]

1. Respondent General Bancshares Corporation is a bank holding company organized under the laws of the State of Missouri, which has a number of wholly-owned subsidiaries located within Missouri, Illinois and Tennessee. During the period involved in this case, continuing through May 12, 1983, respondent Traders National Bank was a wholly-owned subsidiary

(Continued on following page)

Petitioners seek review of the decision of the United States Court of Appeals for the Eighth Circuit which affirmed judgments in favor of respondents in an action for malicious prosecution brought under Missouri law.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals, reported at 779 F. 2d 466 (1986), appears in Appendix A to petitioners' Petition, at Page A1. The opinion of the United States District Court for the Western District of Missouri is not reported, but is set forth at Page A13 of the Appendix to the Petition.

STATEMENT OF THE CASE

This is a malicious prosecution case in which petitioners, plaintiffs below, allege that respondents instigated and maintained three actions for conversion against purchasers of cattle which respondents believed were collateral for a bank loan. The relevant facts were well-stated by the Court of Appeals, and are summarized as follows.

Footnote continued—

of General Bancshares Corporation. General Bancshares sold Traders National Bank to Kansas City Bancshares, Inc., and Traders was later (July 17, 1984) merged into what is now known as the Bank of Kansas City. Kansas City Bancshares, Inc. is a bank holding company organized under the laws of the State of Missouri, with a number of wholly-owned bank subsidiaries, all located within Missouri.

Respondent Thomas J. Guilfoil is an attorney and partner in the St. Louis, Missouri law firm of Guilfoil, Petzall & Shoemake. Respondents John H. Kreamer, William L. Turner, Wayne Hoecker and George Coughlin are attorneys and partners in the Kansas City, Missouri law firm of Gage & Tucker, and may be referred to collectively herein as "Gage & Tucker." *See* Supreme Court Rule 28.1.

In 1975 Traders National Bank (Traders) made two loans totaling $1.9 million to Ray Olson of Milan, Missouri. The bank's security agreement covered "all livestock now owned or hereafter acquired by Debtor." Because of the size of the loan, an affiliate bank, the Bank of St. Louis (BOSL) took a participation. In January 1976, Traders became suspicious of Olson and began to investigate. When the bank was unable to locate any of its collateral, the bank turned the matter over to its attorneys, Gage & Tucker, who began foreclosure proceedings. Gage & Tucker consulted with respondent Guilfoil, attorney for BOSL, and with officers of the holding company, General Bancshares. Gage & Tucker conducted extensive investigation and discovery in an effort to locate Olson's assets. The investigation revealed that Olson owned an 812-acre ranch which contained cattle holding pens and loading chutes, owned 26,260 pounds of corn, and leased 2,000 acres of land on which he grew hay. The investigation also revealed that Olson had recently purchased approximately 3,300 head of cattle, and sold, through the Milan Livestock Auction, 4,468 head of cattle.

On March 23, 1976, William Turner, a Gage & Tucker partner, asked George Coughlin, then an associate, to research the question whether Traders' security interest could be "traced" to the purchasers of Olson's cattle. Coughlin analyzed sections 9-109 and 9-307 of the Uniform Commercial Code, R. S. Mo. §§400.9-109 and 400.9-307, and concluded that Traders had a reasonable chance of recovering the value of the cattle from the purchasers. Coughlin's reasoning was simple and logical: Traders' security interest in the cattle would remain with the cattle, notwithstanding sale to bona fide purchasers, if the cattle were "farm products" as defined by the UCC. Farm products are defined as "crops or livestock or supplies used

or produced in farming operations . . . [which] are in possession of a debtor engaged in raising, fattening, grazing or other farming operations." Coughlin reasoned that the cattle, being "livestock" in the possession of Olson, a "person engaged in farming operations," were farm products. Under Coughlin's theory, the fact that the cattle were not used or produced in Olson's farming operations was irrelevant. Coughlin recommended that suit be filed to recover the value of the cattle.

Gage & Tucker discussed this theory with Traders' board of directors and sent a copy of Coughlin's research memorandum to Jack Minton, the president of BOSL, and to Guilfoil. Traders' president, believing that Guilfoil and Minton concurred in the decision, authorized Gage & Tucker to file suit.

In July, 1976, Gage & Tucker filed three suits against the cattle purchasers for conversion (two in federal court and one in state court). During discovery, Gage & Tucker encountered unexpected evidentiary problems, and concluded that Traders would be unable to prove that the underlying debtor, Olson, was a "person engaged in farming operations." If Olson were not such a person, the cattle would be "inventory," and purchasers would take free and clear of Traders' security interest. Gage & Tucker, in the fall of 1977, advised Traders that it was unlikely to prevail against the cattle purchasers, and recommended dismissal. The state court action was voluntarily dismissed in November, 1977. One month later, the district court entered summary judgment against Traders.

In 1978, petitioners sued Traders for malicious prosecution. In 1982 petitioners filed a second action for malicious prosecution against Gage & Tucker, General Bancshares, Guilfoil and others, and the cases were subse-

quently consolidated. At the close of discovery, both sides moved for summary judgment, alleging that the material facts were undisputed. The District Court granted summary judgment in favor of Gage & Tucker, General Bancshares and Guilfoil, but denied Traders' motion and set the case for trial. The jury, after two weeks of evidence, returned a verdict in favor of Traders. The Eighth Circuit affirmed both the verdict and the summary judgments in favor of defendants.

The decisions by the District Court and the Eighth Circuit were solidly based on well-settled Missouri law. Petitioners, in essence, are asking this Court to review evidence and overturn two lower court decisions as to the legal impact of that evidence. Such is not the role of this Court, and the Petition should be denied.

REASONS WHY THE WRIT SHOULD BE DENIED

I. This Case Presents No Substantial Question Of Federal Or Constitutional Law Meriting Review By This Court.

There is no federal question presented in this case. This is a state law malicious prosecution action arising out of an underlying state law action for conversion based on provisions of the Missouri Uniform Commercial Code, R. S. Mo. §§400.9-109 and 400.9-307. None of the considerations stated in Supreme Court Rule 17 are present here, and the Petition for a Writ of Certiorari should be denied.

Supreme Court Rule 17 states, "A review on writ of certiorari is not a matter of right, but of judicial discretion,

and will be granted only when there are special and important reasons therefor." This Court has always practiced "severe restraint in reviewing questions of state law." 17 C. Wright and A. Miller, *Federal Practice & Procedure,* §4036 at 30 (1978). In this case, the Eighth Circuit did no more than review the District Court's findings in light of well-settled Missouri state law. This Court has stated that:

> We do not ordinarily review the holding of a Court of Appeals on a matter of state law, and we find no reason for departing from that tradition in this case.

Pierson v. Ray, 386 U.S. 547, 558 n.12 (1967). As this Court more recently stated in *Haring v. Prosise,* 462 U.S. 306, 314 n.8 (1983):

> We emphasize, however, that, standing alone, a challenge to state-law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review. See Supreme Court Rule 17.

Both the District Court and the Eighth Circuit reached the same, correct result on a question of state law. There is no ground for certiorari.

This Court has repeatedly refused to grant certiorari on similar facts. For example, in *Wolf v. Weinstein,* 372 U.S. 633, 636 (1963), this Court dismissed a writ of certiorari as improvidently granted when it determined that the case "primarily implicates questions of Pennsylvania law and presents no federal question of substance." In *Ruhlin v. New York Life Insurance Company,* 304 U.S. 202 (1938) this Court noted that even where there is a conflict between the Courts of Appeal, no writ should issue when the conflict concerns a matter controlled by state law.

The instant petition has even less merit after the 1980 revisions to Supreme Court Rule 17, which *deleted* from the statement of considerations governing review on certiorari lower court decisions resolving "an important state or territorial question in a way in conflict with applicable state or territorial law." Clearly, this Court need not burden itself by reviewing a case such as this, involving purely questions of state law.

Petitioners cannot bootstrap themselves into this Court by arguing that the Court of Appeals has violated the *Erie* doctrine by "misapplying" state law. This Court held in *Erie Railroad Company v. Tompkins,* 304 U.S. 64, 78 (1938) that "except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State . . . . There is no federal general common law." This Court reversed the Court of Appeals' decision in *Erie* because it had applied "federal common law" in a personal injury case arising from a train accident which occurred in Pennsylvania.

The record in this case shows without question that the parties, the District Court and the Court of Appeals all treated this as a state law case from the beginning. The statutes involved in the underlying conversion action were Missouri statutes, R. S. Mo. §§400.9-109 and 400.9-307. The District Court relied almost entirely on Missouri state court decisions, including *Haswell v. Liberty Mutual Insurance Company,* 557 S.W. 2d 628 (Mo. banc 1977), *Henderson v. Cape Trading Company,* 316 Mo. 384, 289 S.W. 332 (Mo. 1926), and *Bartley v. Special School District of St. Louis County,* 649 S.W. 2d 864 (Mo. banc 1983). The Eighth Circuit cited and relied on Missouri's version of the Uniform Commercial Code, *Zahorsky v. Griffin, Dysart,* 690 S.W. 2d 144 (Mo. App. 1985), *McGuire v. Wilcher,*

689 S.W. 2d 719 (Mo. App. 1985) and *Haswell v. Liberty Mutual.* Neither lower court purported to supplant state law and resolve this case under "federal general common law."

Petitioners admit that the Court of Appeals "correctly stated Missouri malicious prosecution law regarding probable cause" (Petition at 11). Petitioners do not argue that the Court of Appeals did not apply Missouri law; rather, petitioners argue that the Court "misapplied" that law (Petition at 15). Such alleged "misapplication" of state law does not violate the *Erie* doctrine. There is no federal question involved in this case, and the Petition for a Writ of Certiorari should be denied.

II. This Case Involves Only A Review Of Evidence And Specific Facts On A Purely State-Law Cause Of Action, And Does Not Merit Review By This Court.

Petitioners admit that "the lower courts correctly stated Missouri malicious prosecution law" but complain that they "misapplied Missouri law when they held *that under the facts of this case* it was reasonable for defendants to file actions against petitioners" (Petition at 15, emphasis added). Petitioners are asking this Court to review the application of specific facts and evidence to undisputed state law. This Court has a long-standing rule that "we do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston,* 268 U.S. 220, 227 (1925) (Holmes, J.); *Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500, 537 (1957) ("the rule that the Court does not grant certiorari to review evidence is a wise rule, indeed indispensable to the work of the Court"); *Sentilles v. Inter-Caribbean Shipping Corp.,* 361 U.S. 107, 146 (1959) (Frankfurter, J., dissenting).

Petitioners' aim is to have this Court reverse the application of well-settled Missouri law to a specific factual setting. Petitioners do not complain that the Court of Appeals applied the wrong law, but only that the conclusion reached was incorrect in light of the record. There is no reason for this Court to review the particular factual record developed below.

This Court has often stated that it will not offer what is in essence a third review of questions of state law, especially where the District Court and Court of Appeals have agreed as to the effect of the underlying state law. For example, in *Bishop v. Wood,* 426 U.S. 341, 346 n.10 (1976), this Court stated that "In dealing with issues of state law that enter into judgments of federal courts, we are hesitant to overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable," *quoting Propper v. Clark,* 337 U.S. 472, 486-87 (1949). More recently, this Court stated in *Haring v. Prosise,* 462 U.S. at 314 n.8:

> It is our practice to accept a reasonable construction of state law by the Court of Appeals "even if an examination of the state-law issue without such guidance might have justified a different conclusion" (quoting *Bishop v. Wood*).

Accord, Cort v. Ash, 422 U.S. 66, 72 n.6 (1975) ("This Court must necessarily depend upon the district courts and courts of appeals for initial determination of questions of state law; indeed, our practice of deference to such determination should generally render unnecessary review of their decisions in this respect").

The Eighth Circuit's interpretation of Missouri law was not only reasonable, but was well grounded and cor-

rect. Petitioners admit that the Court of Appeals correctly *stated* Missouri malicious prosecution law. Petitioners have not cited any Missouri cases which are contrary to those relied upon by the Court of Appeals, nor have petitioners claimed that the Court of Appeals overlooked any relevant decisions. The decision below was manifestly reasonable, and there is no reason for a writ of certiorari.

III. The Decision Below Was Correct In Light Of The Evidence And Was Fully Consistent With Well-Established Principles Of Missouri Law.

The Court of Appeals, relying on *Haswell v. Liberty Mutual Insurance Company,* 557 S.W. 2d 628 (Mo. banc 1977), held that the District Court was correct in ruling as a matter of law that defendants Gage & Tucker, General Bancshares and Guilfoil had probable cause to file the underlying conversion actions. The decision of the Court of Appeals was consistent not only with *Haswell,* but also with newer cases, *Zahorsky v. Griffin, Dysart,* 690 S.W. 2d 144 (Mo. App. 1985) and *McGuire v. Wilcher,* 689 S.W. 2d 719 (Mo. App. 1985).

The key issue in the decisions below with regard to Gage & Tucker, General Bancshares and Guilfoil is whether these respondents had probable cause for the instigation of the underlying conversion suits.[2] The Eighth Circuit correctly stated the definition of probable cause for the

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2. As the Eighth Circuit noted, the District Court's decision with regard to these defendants was made on cross-motions for summary judgment. *See* Appendix A6, 779 F. 2d at 469. Petitioners did not argue in the Eighth Circuit, and do not argue in their Petition, that either the District Court or the Eighth Circuit misapplied the summary judgment requirements of Fed. R. Civ. P. 56.

purposes of malicious prosecution cases, 779 F. 2d at 469, Appendix A7:

> The Supreme Court of Missouri has recognized the definition of probable cause for the initiation of a civil action to consist of "a belief in the facts alleged, based on sufficient circumstances to reasonably induce such belief by a person of ordinary prudence in the same situation, plus a reasonable belief by such person that under the facts the claim may be valid under the applicable law."

(quoting *Zahorsky v. Griffin, Dysart,* 690 S.W. 2d at 151 and *Haswell v. Liberty Mutual,* 557 S.W. 2d at 633). The Eighth Circuit further correctly noted that "where the facts concerning the issue of want of probable cause in a suit for malicious prosecution are not in dispute the issue becomes one of law to be decided by the Court," citing *McGuire v. Wilcher,* 689 S.W. 2d at 721. The Eighth Circuit noted that under *Zahorsky* and *McGuire,* attorney defendants were to be judged under the *Haswell* standard, and that where an attorney is a defendant in a malicious prosecution case, the issue is "whether the attorney had a good faith belief in the facts disclosed by the client and a reasonable belief that the facts stated a valid claim." *Zahorsky,* 690 S.W. 2d at 154. Petitioners do not assert a different standard.

The Court of Appeals correctly held that on the basis of the undisputed facts, Gage & Tucker "had probable cause to recommend that Traders file the conversion actions." The Court of Appeals, following the District Court, noted that Gage & Tucker had conducted an extensive factual investigation and had a reasonable belief that the facts supported a conversion claim. Based on its investi-

gation and belief in the facts, Gage & Tucker had a "reasonable belief . . . that under the facts the claim may be valid under the applicable law." *Zahorsky,* 690 S.W. 2d at 151. This finding was amply supported by the record.

Further, the Eighth Circuit correctly found that the record supported summary judgment in favor of Guilfoil and General Bancshares, because the undisputed facts "demonstrate that Guilfoil and General Bancshares relied on the advice of Gage & Tucker." 779 F. 2d at 470, Appendix A9. The Eighth Circuit considered, and rejected, petitioners' arguments to the contrary.

With regard to Traders National Bank, the issue before the Eighth Circuit was easier: whether the jury's verdict in favor of Traders was proper. Petitioners make no arguments in this Court concerning trial errors, but rather focus only upon whether the evidence supported the jury's verdict as a matter of law. The District Court ruled that the evidence did support the verdict, and the Eighth Circuit properly agreed. 779 F. 2d at 470-71, Appendix A10.

The evidence has been reviewed by a jury, the District Court and the Court of Appeals. The decision of all three is fully consistent with governing Missouri law, and there is no basis for reversal. The request for a writ of certiorari should be refused.

CONCLUSION

Petitioners' request for certiorari presents no federal or constitutional questions, no conflict between the circuits, no ruling in conflict with applicable decisions of this Court, and not even a conflict between a federal court

and state court on an important question of state law. Petitioners seek to burden this Court's already heavy docket with a case involving purely private interests decided under state law. The decision of the Court of Appeals was correct, and justice has been done. There is no basis for granting a writ of certiorari in this case, and petitioners' request should be denied.

Respectfully submitted,

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